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VIA ELECTRONIC FILING (www.regulations.gov)

Andrew R. Davis
Chief of the Division of Interpretations and Standards
Office of Labor-Management Standards
U.S. Department of Labor
200 Constitution Avenue, NW, Room N-5609
Washington, DC 20210

Re: RIN 1215-AB79 and 1245-AA03; Proposed Rule on Labor-Management Reporting and the Disclosure Act; Interpretation of "Advice" Exemption

Dear Mr. Davis:

The Metropolitan Milwaukee Association of Commerce ("MMAC") respectfully submits the following comments in response to the Notice of Proposed Rulemaking ("Proposed Rule") by the Department of Labor Office of Labor-Management Standards ("Department") published in the Federal Register on June 21, 2011.[1]

The MMAC is a 150-year-old private, not-for-profit organization representing approximately 1,800 member businesses with 300,000 employees in Milwaukee, Waukesha, Washington and Ozaukee counties and beyond. Driven by the needs of its members, MMAC is committed to increasing the economic vitality of the metro Milwaukee business community. The organization's programs and resources center around three core competencies. MMAC is the region's best business network, bringing members together to develop business, share best practices and build stronger business relationships. MMAC is the key private-sector partner for economic development, working to strengthen our business base and attract and retain jobs and the talent to fill them. MMAC serves as the region's advocate for member businesses at the local, state and federal levels.

The Proposed Rule would significantly narrow the interpretation of the "advice" exemption to "persuader activity" reporting requirements of the Labor Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. §401. Under the proposal, communications between employers and their attorneys formerly considered clearly exempt

[1] 76 Fed. Reg. 36178 (June 21, 2011).

would apparently become reportable persuader activity that, in turn, trigger extensive reporting of labor relations services provided by the attorney to other employers unrelated to persuader activity. Lawyers may be reluctant to give legal advice to an employer when their other employer-clients would be put at risk in that way. The proposals also would render the statutory "advice" exemption effectively meaningless and undermine the attorney-client relationship that Congress intended to protect. The Department's attempt to "reinterpret" the "advice" exemption would limit employers' access to legal counsel and chill their ability to communicate with their employees during union organizing campaigns. MMAC and its members have serious concerns with the impact of the Proposed Rule. MMAC strongly opposes the proposal and urges the Department to withdraw the Proposed Rule in its entirety.

I. Background

The LMRDA requires employers to report to the Department, on Form LM-10, any agreement or arrangement with an outside consultant under which the consultant undertakes activities to "persuade employees to exercise or not to exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing." Labor consultants must report their agreements with employers to engage in persuader activity on Form LM-20. Labor consultants engaging in persuade activity must also file Form LM-21 that discloses all receipts from all employer-clients to whom the consultant provided "labor relations advice and services". Although the current rulemaking proposes changes to the Forms LM-10 and LM-20, the Proposed Rule implicates what the consultant must report on the Form LM-21, which the Department intends to address in a separate rulemaking. Therefore, the significant and detrimental changes to the LM-21 Forms necessitated by the Proposed Rule cannot be ignored at this time.

Evidencing Congressional intent to protect the attorney-client relationship, the LMRDA includes a broad exemption from the reporting requirements for persuader activity arrangements based on "advice" provided to an employer. Specifically, Section 203(c) of the statute provides that: "Nothing in this section shall be construed to require any employer or other person to file a report covering the services of such person by reason of his giving or agreeing to give advice to such employer." In addition, Section 204 exempts attorneys from reporting any information protected by the attorney-client privilege. The Department itself acknowledges that, with this provision, "Congress intended to afford attorneys the same protection as that provided in the common-law attorney-client privilege, which protects from disclosure communications made in confidence between a client seeking legal advice and an attorney."[2]

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[2] *Id.* at 36192.

The current interpretation of the "advice" exemption has been in place since 1962 and reflects the intent of Congress to preserve the sanctity of the attorney-client relationship. This long-standing and clear interpretation exempts from the persuader reporting obligations an employer-employee agreement pursuant to which "the consultant has no direct contact with employees and limits his activity to providing to the employer or his supervisors advice or materials for use in persuading employees which the employer has the right to accept or reject." [3] The distinction between the consultant's direct and indirect contact with employees has provided clear direction on the scope of the "advice" exemption.

The Department is proposing to replace this bright-line test that has been in place for nearly 50 years with a vague and broad "reinterpretation" that would effectively eliminate the "advice" exemption. Under the Proposed Rule, persuader activity is defined as follows:

> In contrast to advice, "persuader activity" refers to a consultant's providing material or communications to, or engaging in other actions, conduct, or communications on behalf of an employer that, in whole or in part, have the object directly or indirectly to persuade employees concerning their rights to organize or bargain collectively.

The revised Form LM-10 and LM-20 instructions provide that:

> An employer and consultant each must file a report concerning an agreement or arrangement pursuant to which the consultant engages in activities that have as a direct or indirect object to, explicitly or implicitly, influence the decisions of employees with respect to forming, joining or assisting a union, collective bargaining, or any protected concerted activity (such as a strike) in the workplace.

Therefore, any activity that is directly or indirectly related to persuading employees would fall outside of the "advice" exemption, even if there is no direct contact between a lawyer or other consultant and employees, if persuading employees is, in whole or in part, a direct or indirect object of the activity.

The Proposed Rule cites specific examples of persuader activity that, either alone or in combination, would trigger the reporting obligation. Under the proposed interpretation, a lawyer or other consultant preparing or providing a persuasive script, letter, videotape, or other material or communication, including electronic and digital media, for use by an employer in communicating with employees is not covered by the "advice" exemption. Similarly, a lawyer or other consultant's revision of the employer's materials or communications to enhance the persuasive message also falls outside of the "advice" exemption and triggers the duty to report. Persuader activity would additionally include, among other things, training supervisors and other management representatives to engage in persuader activity and creating employer policies and practices designed to prevent

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[3] *Id.* at 36181.

organizing. The Department explains that, in these instances, the lawyer or labor consultant has gone beyond "mere recommendation" and has engaged in actions, conduct, or communications with the object to persuade employees, either directly or indirectly, about the employees' protected, concerted activity. Accordingly, these activities would trigger the duty to report, whether or not the consultant is in direct contact with the employees.

Under the Department's current interpretation of the scope of the "advice" exemption, in cases that involve the consultant providing both "advice" and persuader activity, the "advice" exemption controls. In a serious departure from the existing interpretation, the Department is proposing to require reporting for conduct that includes both advice and persuader activity, plus broaden what is persuader activity in the first place. Although the Department argues that its radical changes are in keeping with Congressional intent, they are, in fact, quite the opposite. The proposals, taken as a whole, would so narrow the "advice" exemption that, in practice, it would be eviscerated, and with it, the sanctity of the attorney-client relationship Congress intended to protect.

Our objections to the Proposed Rule are explained more fully below.

II. Objections to the Proposed Rule

For nearly 50 years, the Department's interpretation of the "advice" exemption has provided clear direction to employers and their legal counsel. The Department has not demonstrated the need to overturn this long-standing bright-line test and replace it with a vague new standard that would seriously harm employers and the attorneys they have come to rely upon. The Department appears to blame the current rules for the so-called "underreporting" problem, which is derived from the low number of LM-10 and LM-20 reports being filed compared to the numbers of firms and consultants appearing in National Labor Relations Board ("NLRB") representation cases. However, there is no empirical data from Department investigations or enforcement actions to support the assertion about ongoing "substantial underreporting" of persuader activity under the LMRDA. Even if such underreporting described in certain "academic studies" is occurring, the Department has not demonstrated why the existing interpretation would not be sufficient to enforce the LMRDA and compel reporting. Any underreporting, if it does exist, could be solved by simply applying and enforcing the current interpretative rules.

The ambiguously defined new interpretation of "advice" is inconsistent with the broad "advice" exemption that Congress intended. Faced with criminal penalties for willful failures to report or false reporting under the LMRDA, the breadth and vagueness of the proposal will have chilling effect on both employers and their legal counsel. The Department also proposes to expand the definition of what constitutes reportable agreements and arrangements between employers and consultants to engage in persuader activities beyond what Congress intended in the LMRDA. The Department's proposed changes to the

definition of "reportable agreements or arrangements" exceed its authority by contravening the statute itself. Specifically, by requiring reports for agreements and arrangements where a consultant acts to "influence decisions" by employees concerning other rights provided by Section 7 of the National Labor Relations Act ("NLRA") the Department goes much farther than the LMRDA provides.

The Proposed Rule will interfere with the attorney-client relationship and restrict employer access to legal counsel. The current rules have provided clarity to attorneys regarding what services constitute reportable persuader activities. Under the vague and broad proposal, attorneys will find it much more difficult to know whether they must report certain activity. The Department's repudiation of the longstanding interpretation that the advice exemption controls in situations of mixed advice and persuader activity will only add to the uncertainty. This uncertainty will have interfere with the attorney-client relationship and restrict employer access to legal counsel.

Any investigation by the Department into whether the attorney violated the new persuader reporting requirements would likely implicate privileged communications between the attorney and employer-client. The investigator would likely examine the communications between the employer and its attorney to determine if persuader activity was involved. In the course of the investigation, the employer's right to communicate with its attorney in confidence would likely be violated and the attorney-client relationship between the employer and legal counsel undermined.

If the Proposed Rule is finalized, legal services rendered to employers that now fall within the "advice" exemption could be deemed persuader activity, triggering extensive reporting requirements for the employer and their legal counsel. In order to avoid even the appearance of actions that could be considered "persuader" activity and require potential LM-21 reporting of the names and fees of all clients to whom it provided labor relations advice or services, law firms may need to take new measures based on ethics rules to protect other employer-client confidentiality. The very fact that any specific employer has retained any specific attorney or law firm, and the facts and financial terms of that arrangement, are confidential matters. However, a single instance of persuader activity by an attorney would trigger reporting and public disclosure of the firm's clients receiving "labor relations" advice or services unrelated to persuader activity, which could be harmful to the employer-clients' business.

The expanded reporting requirements would dissuade employers from seeking legal advice during union organizing campaigns and deter law firms from offering labor relations advice for fear of triggering persuader reporting obligations. In the face of a broad but ambiguous new standard and criminal sanctions if they continue to offer what could be considered persuader activity, some law firms may stop offering employers labor relations advice or services, leaving employers to go in alone in this complex area of the law.

Employers will most likely have to navigate the challenging waters of union organizing and collective bargaining without the benefit legal counsel, increasing the risks for violating the law. Considered in the context of proposals by the NLRB to shorten the time between the filing of a petition and the conduct of an election, the Proposed Rule would thus place employers at a distinct disadvantage during organizing campaigns. Small employers will be particularly harmed if their access to legal counsel is restricted. The Proposed Rule undermines the attorney-client relationship that Congress sought to protect in the LMRDA and employers' fundamental right to counsel and must be withdrawn.

By limiting employers' access to legal counsel, the Proposed Rule would make it much more difficult for employers to understand theirs rights and obligations during union organizing campaigns and chill their free speech rights. Section 8(c) of the NLRA guarantees employers the right to communicate their position on unionization to employees. Specifically, Section 8(c) provides that: "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice...if such expression contains no threat of reprisal or force or promise of benefit." Without access to legal counsel, many employers, fearful of violating the law, may simply silence themselves and refrain from effectively communicating with employees about unionization during an organizing campaign. In conjunction with the NLRB's proposed rule for so-call "quickie" elections, the Department's proposed changes to the "advice" exemption would further undermine employers' federally protected free speech rights and violate employees' rights to make informed decisions about unionization. Employers proceeding without any legal counsel are left with the untenable choice of either saying nothing to employees about unionization or talking to employees without knowing if the speech is lawful or not and increasing the risk of violating the law.

Executive Order 13563 (January 18, 2011) directs the regulatory agencies take into account the benefits and costs of the regulations and consider their impact on economic growth and job creation. In contravention of the above Executive Order, the Department has not provided an accurate and complete accounting of the costs that such proposed changes would impose on employers and their legal counsel. The Department fails to account for the true cost of its proposal, which includes the cost to employers, especially small employers, of restricting their access to established legal counsel and also includes potential increases in employment and labor law violations by employers not able to obtain timely or reliable legal advice from their established outside counsel or others knowledgeable in the field as a result of restricted access to legal advice.

III. Conclusion

MMAC and its members are strongly opposed to the Proposed Rule. Without justification, the Proposed Rule will effectively eliminate the "advice" exemption authorized by Congress in the LMRDA to protect the attorney-client relationship. By overturning the

longstanding interpretation of the exemption, the Proposed Rule will restrict employers' access to counsel on labor and employment matters. It will also undermine their right to communicate with employees about unionization. In so doing, the Proposed Rule denies employees their right to make a truly free and informed decision on unionization. Although presented as a reinterpretation of the "advice" exemption to promote more transparency, it is, instead, a serious assault on employers and their attorney-client relationships. The Department lacks the authority to embark on this harmful and misguided rulemaking. We call upon to Department to withdraw the Proposed Rule.

Sincerely,

Ilyse W. Schuman

Ilyse W. Schuman,
On Behalf of the Metropolitan Milwaukee Association of Commerce